(31,406)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 683.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLARENCE Y. HOPE, DECEASED,
Respondent.

RESPONDENT'S BRIEF.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Bldg.,
Minneapolis, Minnesota.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

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RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

This case comes here on a writ of certiorari to review a judgment of the Supreme Court of the State of Minnesota, which affirmed a judgment of the District Court of Steele County, Minnesota.

STATEMENT OF FACTS.

Clarence Y. Hope was employed as a railway conductor for the Chicago, Rock Island & Pacific Railway Company. While so employed, he was killed under circumstances creating a liability on the part of the railway company.

It was conceded that the railway company was guilty of negligence, which negligence was a proximate contributing cause of the death of Clarence Y. Hope.

INTERSTATE COMMERCE.

(Figures in parentheses refer to Record folios.)

Hope and the crew of which he was a member were working near a station known as Williamson, in the State of Iowa. There are certain mines located near this station, and the men had to haul cars to and from the mines, and then later haul them out toward the main line track as occasion might demand.

On the day in question the train crew had hauled two certain "drags" from the mine. Instructions were received from the telegraph operator at Williamson relative to the destination of the cars.

In the first drag of cars hauled on the morning Hope was killed, there were *two cars destined to St. Joseph, Missouri.* This fact is undisputed (85-86).

Following the hauling of this first string of cars, another or second drag was hauled in from the mines. The second drag did not contain any interstate cars.

The first string, which contained the two interstate cars, was placed on a track known as No. 1 track.

The second drag of cars was also put on this same No. 1 track, and in the switching movement that the men had to do after the second drag was brought in, they moved the second drag which contained the intrastate cars and *also moved and switched the first drag, containing the interstate cars,* being the cars destined from Iowa to St. Joseph, Missouri.

The switching of the cars at the mines was the last work the men had to do before they left the mines, and went out onto the main line track, intending then to go to Chariton, Iowa for dinner, and to get water for the engine.

The St. Joseph cars were on track No. 1. In the second switching movement, as testified to by the witness Elder:

"A. We shoved them down to five or six car lengths.

Q. On track one?

A. On track one" (171-172).

After these cars were shoved in on track No. 1, the witness Elder set the brakes on three loaded cars. One of these cars was destined to Allerton, Iowa, and *two were destined to St. Joseph, Missouri* (173).

"Q. Was that *the last work* that Conductor Hope's crew did with reference—

A. That was *the last thing we ever did*" (173).

It will be noted that the very last work that the crew did with the cars before going out onto the main line and before going to dinner, was *to move the interstate cars destined to St. Joseph, Missouri*, as well as the intrastate cars, and then to *set the brakes on the two interstate cars.*

Although the last and final work of decedent's crew was to "tie down" the string containing both interstate and intrastate cars, the actual work of setting the brakes on the two interstate cars was the last work the crew did.

It might be noted that this question of *setting the brakes on the interstate cars*, the last work of the crew, *was not disputed at the trial.*

It was also a part of the duty of the train crew to carry the "manifests" or bills of lading with them into Chariton. These manifests were given to the conductor Hope before

his train started for Chariton. They were to be mailed from Chariton.

The train crew received orders *permitting them to enter the main line track* and take their engine and caboose and go to Chariton for dinner and to get water for the engine.

Naturally, the running of this train on the main line track was not *a matter of indifference* to the general interstate commerce of the carrier.

The engineer, Sam Woods, in charge of the locomotive hauling the caboose, in which Hope was riding, testified as to the order he received regarding the permission to enter the main line. This order was Exhibit 3 and the material portion was as follows:

> "No. 912 engine unknown and all eastward extras wait at Chariton until 1:30 P. M. All first-class trains due Pershing before 12:10 P. M. have arrived or left" (109, 111, 266).

This order meant that the track was clear and that there were no trains approaching from the east (112-113).

> "Q. I will ask it in this way, Mr. Woods, when you received that order, you may tell the jury whether that *gave you any preference as to entering the main line?*
>
> A. *It did.*
>
> Q. And what right did that give you, after you received that order?
>
> A. *It gave me the right to move from Pershing to Chariton.*
>
> Q. *Yes, over the main line?*
>
> A. *Yes, sir.*
>
> Q. And you may tell whether or not in giving you the right to move from Pershing to Chariton, whether

or not any other train, no matter what train it was, would have any right to use that track while you were on the way? * * *

A. It just gave you the right to use that track from there to Chariton; eastbound train couldn't come against you" (116-118).

Pursuant to this order permitting this engine to go onto the main line track, the crew started for Chariton. Hope and the brakeman, Elder, were in the caboose of the train.

Without any notice or warning to the men that the train was to be expected, train No. 69, the Kansas City-St. Paul train, crashed into this caboose (114). In this collision Mr. Hope was injured (121).

At the time of the collision the men were still within the limits of Pershing Yard (122), although on the main line as aforesaid.

There is no dispute but that the work at the mine had not been completed at the time of the collision.

"Q. You may tell the jury whether it is customary when you pull the engines to pull *all* the loaded cars out and place them on the tracks at Pershing siding?

A. Yes.

Q. And you hadn't pulled them all out that day, had you?

A. No.

Q. And you were going in at that time to get water for your engine, weren't you?

A. Yes, sir, we were going in to get water and dinner.

Q. And unless, if this mine hadn't been entirely switched, I will ask you whether or not it is a fact that unless you got orders to go elsewhere it would be the

duty of Mr. Hope to complete the switching of that mine? Is that a fact?

A. Unless we got different orders to go some place to work?

Q. Yes.

A. Yes, it would have been his duty to have cleaned up the work at the mine" (136-138).

There were no orders received to go any other place and nothing in the evidence controverting the testimony of the witness Elder that the men were to return to the mine that afternoon (139-144).

There is no dispute on this question.

It is undisputed that the running of this engine and caboose on the main line had to be at the orders of the train dispatcher and that it must be run and operated with reference to other trains on the main line.

The manifests or bills, which were carried by Hope in the caboose, were never received by the operator, Myrtle Hanlon (79).

"Q. Do you know what became of them?

A. I don't know, but I suppose they burned up in his caboose" (80).

The manifests were necessary to be used by this witness to make proper checks in her office as to the cars in question (81-82-83).

The witness Elder saw the manifests in the caboose (163), but the caboose was demolished in the collision, and the conclusion is irresistible that the manifests were burned up in the fire following the collision.

The above statement as to the general work of the crew is given in detail in order that the facts showing the inter-

state character of decedent's employment may be clearly seen by the court.

Defendant's Liability Undisputed.

It was stipulated at the trial that the defendant was absolutely liable for the death of decedent and no defense on the question of liability was interposed.

The Defense.

After Hope was killed, A. D. Schendel was appointed as Special Administrator by the Probate Court of Hennepin County, Minnesota, following the usual practice prevailing in that state as to such appointments. This appointment was made on *February 20th, 1923.*

This action, under the Federal Employers' Liability Law, was commenced in the District Court of Steele County, Minnesota, by the Administrator on *February 21st, 1923.*

After this action was commenced, and on the second day of March, 1923, the *railway company* initiated proceedings in the State of Iowa under the Iowa Workmen's Compensation Act.

It is to be borne in mind that *no one in behalf of any survivor of decedent or any of his dependents started any proceeding under the Iowa Compensation Act.*

The railway company did initiate proceedings on March 2nd, 1923, some time after plaintiff had commenced the action in the District Court of Steele County, Minnesota.

Under the Iowa Compensation Act either party may initiate the proceedings.

The railway company did initiate the proceedings under

the Iowa Act, the application being entitled: *"In the Matter of C. Y. Hope, Deceased"* (428-431).

Before the commencement of these proceedings the Special Administrator had commenced the action, under the Federal Statute in the District Court of Steele County, Minnesota.

This action was based on the Federal Employers' Liability Act, the plaintiff specifically alleging interstate commerce as follows:

> "5th: That at the time of the injuries to and the death of decedent, as herein set forth, defendant was a railroad corporation engaged and working in interstate commerce; and that at the time of the injuries to decedent, he was working for defendant as its agent and servant and as such was engaged in interstate commerce" (5th Paragraph, Complaint, 9-10).

The Answer.

The original answer in the case was, in effect, a general denial with the allegation that decedent's injuries were due to his own want of care and that he assumed the risk.

There was a denial that decedent was engaged in interstate commerce, and it was alleged that his rights were governed by the Iowa Compensation Law.

Following this, a supplemental answer was interposed, when it was set forth that proceedings had been initiated by the railway company under the Compensation Act of Iowa.

Following this, there was a further supplemental answer to the effect that the District Court of Iowa had approved the award of the Commissioner, and that the award had ripened into a judgment, which was pleaded as a bar to the present case.

Jessie Hope was the surviving widow of decedent. She was the sole dependent as appeared from the evidence adduced at the trial in the District Court of Steele County, Minnesota.

When she was served with notice that the railway company wished to have her rights determined under the Compensation Act, she (not the administrator) filed an answer and set forth that Hope was engaged in interstate commerce at the time he was injured, and that an action was pending in the District Court of Minnesota under the Federal Act, the action having been brought by A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, deceased.

The Special Administrator of the estate, the respondent in this court, did not appear in the proceeding before the Iowa Compensation Board. The surviving widow, who was served with notice to appear, did appear by written pleading, but not personally, and set forth that Hope was engaged in interstate commerce, and that the Iowa court had *no jurisdiction* to make any award of damages because of his death.

She specifically claimed the *Board was without any power or authority to act in the matter.*

The railway company, however, prevailed in Iowa, and Mrs. Hope was unable to stop the Commission from proceeding.

They found in her favor (?) under the Iowa Compensation Act awarding her the small weekly payment which that statute provides for. No money was ever received or accepted by Mrs. Hope.

Following the award by the Commissioner, the proceedings were reviewed by the District Court of Iowa, and a judgment in favor of Mrs. Hope was entered in the Districe Court of Lucas County, Iowa.

This judgment is *"In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee"* (484-485).

It will here be noted that the Compensation proceedings at first were "In the Matter of C. Y. Hope, Deceased," and that the judgment was entered: *"In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee."*

There is no evidence to show that Mrs. Hope attended any hearing of the Industrial Commission. She was not present and did not participate in any of these proceedings, but at all times protested that the right to recover damages for the death of her husband was in the hands of a Special Administrator proceeding under a law of the United States.

The Iowa Commission paid scant heed to the action under the Federal Statute, and the Commission, being able to act with more celerity than the ordinary common law court, made an award to Mrs. Hope before the District Court of Steele County, Minnesota, could try the action based on the law of Congress.

It will be remembered, however, that the Special Administrator in Minnesota was *appointed prior to the commencement of proceedings under the Compensation Act of Iowa*, and that the action under the Federal statute *was started before* the Iowa proceedings.

The defendant offered the Iowa judgment as a complete bar to the action under the Federal statute. While defendant conceded that there was a lack of identity of parties, it contended that Mrs. C. Y. Hope was the sole beneficiary under the Federal statute, and that, therefore, a judgment

in her favor under the Compensation Act, the award being made to her as widow, of Clarence Y. Hope, would constitute a bar to the maintenance of the action under the Federal statute.

The railway company also claimed that if the Iowa judgment could not be *res adjudicata* in the full and complete sense, it did operate as an estoppel because the Iowa Commission determined that Hope was engaged in intrastate commerce; that this determination was *one of fact*, and that a finding of this fact was a bar to any further inquiry into the nature of Hope's employment.

The Position of the Trial Court.

The trial court submitted the question of interstate commerce to the jury.

It will at once be apparent to the court that decedent Hope *was* engaged in interstate commerce, *as a matter of law*, but the trial court gave the railway company the benefit of any doubt on the question, and submitted it as a question of fact for the jury, leaving it for them to determine whether "his work was so closely and intimately connected with the general interstate work of the carrier as to be deemed in law a part of it."

The jury were told further that if decedent Hope was not engaged in interstate commerce, there could be no recovery by the plaintiff.

The question of damages was properly submitted to the jury, and a general verdict was returned in plaintiff's favor.

Under the Minnesota practice, after the verdict was returned, a motion for judgment notwithstanding the verdict, or for a new trial, was made by the railway company. This

(2) Whether proceedings taken in Iowa under its compensation act, upon the initiative of the defendant, after the commencement of this action, resulting in an award to the widow of the decedent, bars a recovery upon the ground that it was there determined that the deceased was engaged in intrastate commerce.

(3) Whether there is such identity of parties as to make the finding that the decedent was employed in intrastate commerce available as an estoppel" (638).

These questions were all answered in plaintiff's favor, the court holding that "whether he was employed in interstate commerce was at least one (a question) for the jury" (649).

The Supreme Court, in answering the second question as to whether the Iowa award could bar a recovery under the Federal statute, quoted the jurisdictional provision of the Act, saying:

"The provision as to jurisdiction is as follows: 'Under this act an action may be brought in circuit (now district) *court* of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the *courts* of the United States under this act shall be concurrent with that of the *courts* of the several states'" (654-655).

It was next said by the Minnesota Supreme Court that when its *jurisdiction was invoked, it was its duty to proceed with the action,* citing *Second Employers' Liability Cases,* 223 U. S. 1 (654-655).

The court next took the position that the Federal Act, within the field which it covers, *supersedes the common law*

liability of defendant and also State Compensation Acts (657).

IOWA PROCEEDING NOT ACCORDING TO COURSE OF COMMON LAW.

Mr. Justice Dibell, speaking for the Minnesota court, then called attention to the fact that Congress intended the Federal right to be enforced in a court proceeding as at common law, saying:

> "The right of action which the Federal Employers' Liability Act gives *is to be enforced in a court proceeding according to the course of the common law* in the orderly investigation of facts and the application of the law. That is the clear purpose of the act. *Congress so intended for it designated courts of that character to administer it.*
>
> The proceeding before the industrial commissioner *is not according to the course of the common law.* It is a special statutory proceeding, summary in character, and largely administrative, though involving judicial discretion and providing for a judicial review" (657-658).

Following this subject further, as it related to the claim that the Iowa judgment was *res adjudicata* and acted as an estoppel as to the question of the character of decedent's employment, Mr. Justice Dibell said:

> "If this view be the correct one the question whether *courts of comomn law jurisdiction, designated by Congress,* shall determine the employe's rights *in a common law proceeding,* or whether they shall be determined by compensation boards *proceeding summarily, may depend upon which moves with the greater celerity;* and

in the ordinary case it is the compensation board. It is illustrated here. The *award* was made *within 18 days* after the commencement of the proceeding, and in 90 days after the commencement of the proceeding the award was affirmed by the court. It was a year after its commencement before the action based on the Federal right was called for trial" (663-664).

Mr. Justice Dibell further said:

"It seems that something is wrong in the law or its administration, if one claiming and enforcing a cause of action under the Federal Act, the character of the employment as interstate determining his right, and the character of his employment being uncertain as a question of law, or for the jury as a question of fact, must lose it if he seeks to protect himself in a less valuable right under the compensation act. See *Corbett v. Boston & Maine R. Co.*, 219 Mass. 351. This is not quite the case here, for the beneficiary fought against instead of for the application of the compensation act" (666).

Following this Mr. Justice Dibell made a statement which in reality is the fundamental thing for consideration here. The statement is—

"The *determining single question* was whether the decedent was euployed in interstate commerce" (668).

It being found that decedent *was* engaged in interstate commerce, the court said:

"We are content to hold that *the substantive right given the employee* or his representative *by Congress* under express constitutional grant, *with the courts to which he may go for its enforcement pointed out to him*, is a *superior substantive right;* and that *when he or his*

representative has chosen the forum to which to submit his cause, *he cannot,* against his objection and *upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act*" (671-672).

The court next took the position that as plaintiff was not a party to the compensation proceeding, there was no identity of parties between Mrs. C. Y. Hope, as widow, and A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased (675), relying upon the case of *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434 (678).

ARGUMENTS, POINTS AND AUTHORITIES.

The Questions for this Court to Determine.

As we view the record, there are three questions to be determined by this court. The questions are:

1st. Was the decedent engaged in interstate commerce as a matter of law, or was there evidence sufficient to justify the submission of the question to the jury?

2nd. Can proceedings under the State Workmen's Compensation Act, taken upon the initiation of the defendant after the commencement of an action under the Federal statute, interfere with, bar, or prevent a recovery under the Federal Law, on the theory that the Commission has found as a "fact" that decedent was engaged in intrastate commerce?

3rd. Whether there is such identity of parties in a proceeding entitled "In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased, Mrs.

C. Y. Hope, Appellant vs. Chicago, Rock Island & Pacific Railway Company, Appellee," and the parties, as appear in the case at bar, that is, where A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, is plaintiff—whether there is such identity of parties as to make a finding in the one proceeding a bar to the other.

THE FIRST QUESTION.

I. Was the decedent engaged in interstate commerce as a matter of law, or was there evidence sufficient to justify the submission of the question to the jury?

The evidence, without dispute, showed that the last work Hope did was *to set the brakes on two interstate cars.* He and his crew then left with orders permitting them to go onto the main line track, which track they were going to use to go to Chariton for dinner and for water for the engine.

They were going to return in the afternoon and *complete their work* at the mines and do *other switching of these particular cars.*

Hope carried with him the manifests or bills of lading showing the contents of the cars which had been switched, their destination, etc. These lists pertained to two interstate cars as well as the intrastate cars.

While enroute to Chariton and on the main line track, their train was run into by another interstate train, and Hope received injuries from which he died.

Hope was engaged in interstate commerce because:

1st. The last work of the crew had to do with two interstate cars, being the cars consigned from Pershing, Iowa, to St. Joseph, Missouri (173).

2nd. His train was permitted to go onto the main line

and had to be run with reference to the presence of other trains on such main line track.

3rd. Hope's crew carried the manifests and bills with them which were a necessary part of the carrier's general interstate work.

4th. Taking the entire work into consideration, it clearly showed that it was not a matter of indifference to the general work of the carrier, but that it bore such a close relation to the carrier's general work as to be deemed in law a part of it.

GENERAL TEST OF INTERSTATE COMMERCE.

The test as to when a servant is engaged in interstate commerce and the general rules have been stated many times by the United States Supreme Court. For instance—

> "Was the employee, at the time of the injury, engaged in interstate transportation or in work *so closely related to it* as to be practically a part of it"?
>
> *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436.

> "Generally when applicability of the Federal Employer's Liability Act is uncertain, the character of the employment *in relation to commerce,* may be adequately tested by inquiring whether at the time of the injury the employee was engaged in work *so closely related with* interstate transportation as practically to be a part of it."
>
> *So. P. R. Co. v. Ind. Accident Com.*, 251 U. S. 259, 64 L. Ed. 258.
>
> *Ind. Accident Com. v. Davis*, 259 U. S. 182, 66 L. Ed. 888.

"Was the work being done *independently of the interstate commerce* in which the company was engaged or was it so *closely connected therewith* as to be a part of it. Was its performance *a matter of indifference* so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

Kinzell v. C., M. & St. P. R. Co., 250 U. S. 130, 63 L. Ed. 892.

Pederson v. D., L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125.

The tendency of the courts has been liberal rather than restrictive in determining what would constitute interstate commerce.

We call attention to the case of *Erie R. Co. v. Collins*, 253 U. S. 77, 64 L. Ed. 790 and *Erie R. Co. v. Szary*, 253 U. S. 86, 64 L. Ed. 794.

Basing the proposition solely on the last work Hope's crew did—the setting of the brakes on the two interstate cars—and without reference to any other acts having to do with the carrier's interstate work, it is clear that Hope was engaged in interstate commerce not as a fact question, but absolutely and unqualifiedly as a matter of law.

"To separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies."

Phila. & R. R. Co. v. Di Donato, 256 U. S. 237, 65 L. Ed. 955.

Reference may be made to *New Y. C. R. Co. v. Carr*, 238 U. S. 261, 59 L. Ed. 1299, where a brakeman was setting out two intrastate cars from an interstate train, and his work was held to be interstate in character.

In that case, as stated by Mr. Justice Lamar:

> "The matter is not to be decided by considering the physical position of the employee at the moment of the injury. If he is hurt in the course of his employment while going to the car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal Act."

In the Parker case a fireman was killed while his engine was transferring an empty car from one switch track to another. The purpose was to reach and move an interstate car. This work was held to be interstate in character.

Louisville & N. R. Co. v. Parker, 242 U. S. 12, 61 L. Ed. 119.

Counsel for appellant refer to *Illinois C. R. Co. v. Behrens*, 233 U. S. 472, 58 L. Ed. 1051. This case is not in point because there was no *purpose* to move interstate cars or to do any work with interstate cars in that case. There was simply a switching movement of purely intrastate cars.

As stated in the Parker case, *supra*:

> "The difference is marked between a mere expectation that the work done would be followed by other work of a different character as in *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, and doing the act for the *purpose* of furthering the later work."

The work being done under the decisions referred to was interstate without any reference to any main track movement at the point of injury.

Leaving the question of switching interstate cars for a moment, however, the work, it will be seen, was interstate in character on another theory.

Hope's train *entered the main line under orders from the dispatcher.* This movement had *reference to the movement of other cars on the main line.*

This movement had "relation to commerce" of the defendant; it had relation to the movement of an oncoming interstate train.

The operation of this train on the main line was not "being done *independently* of the interstate commerce in which the company was engaged."

It was so closely connected with that commerce as to be part of it. It certainly was not *"a matter of indifference* so far as that commerce was concerned."

Plaintiff does not contend that the interstate character of train No. 69, which struck decedent, would, in and of itself, make the work of Hope interstate, but that under all the evidence in this case the movement being under the orders of the dispatcher and having reference to the passing of other trains, and having to be made with reference to the safety of interstate trains, it was at least a question for the jury whether that movement in and of itself did not constitute interstate commerce; whether it was not *so closely related to the general work* of the carrier as to be a part of it.

Reverting now to the work at the yards, that was interstate commerce, as a matter of law. Should there, however, be any question as to this, there cannot, it seems to us, be any question but that the entire evidence presented a jury issue as to whether or not decedent's work bore that relation to the general interstate work of the carrier which would make his employment interstate.

It does not need argument to convince the court that Hope was engaged in interstate commerce in doing the work that was being done, when the two St. Joseph cars were being

moved and switched and the brakes thereon set, previous to going onto the main line for lunch at Chariton and for the purpose of obtaining water for the engine. This evidence coupled with the movement on the main line shows interstate commerce as a matter of law.

In many cases the Supreme Court of the United States has stated that where the question as to the character of the work is doubtful, the issue should be determined *as a question of fact by the jury.*

Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. Ed. 139.

The question of interstate commerce is plain on many phases.

In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, it appeared that a car checker was injured while taking down the numbers of cars in defendant's railway yards.

The Supreme Court of the United States held that the taking of these numbers and the making of the records constituted interstate commerce.

By the same reasoning the carrying of the manifests in the caboose by Hope was work in furtherance of interstate commerce.

The record shows that the railway company had to have these manifests in order to complete their records as to the points of origin and destination of the cars in question.

It was part of Hope's duty to carry the manifests to Chariton and to see that they were delivered to the operator at Williamson. While carrying these manifests, under the doctrine of the Seale case, he was, by reason of this fact alone, engaged in interstate commerce.

In considering the question of interstate commerce, while

it may inferentially appear from the record, by reason of the report of the Deputy Industrial Commissioner, that the witness Elder was not a witness at the hearing before the Commission, it is clear that the railway company must have known of the movement of these cars, and must have known of the order permitting the train to go on the main line track, and must have known that the duty of Hope's crew was to carry the manifests in question on the main line track to Chariton for the purpose of mailing them, and it must have known that this was a necessary duty to be performed in connection with the general interstate work of the carrier.

This being so, the position in which the railway company is now is similar to the position of the railway company in *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865.

In that case the Supreme Court, speaking by Mr. Justice Hughes, said:

> "The defendants knew the actual movement of the cars, and, failing to inform the court upon this point, cannot complain that they have been deprived of a Federal right."

By the same line of reasoning the railway company here cannot complain that they have been deprived of a Federal right because the acts of the Commissioner have not been accepted as final when it is apparent to the court that had the railway company fully presented the facts to the Commission, the Commission could not have come to any other conclusion but that decedent was engaged in interstate commerce.

In *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, it was said:

> "The doing of plaintiff's work, and his security while

doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce."

In the case at bar, it cannot be said that the running of the train in charge of Conductor Hope under express orders from the dispatcher and the running of it on the main line of defendant had no relation "to the safety of the main track as a highway of interstate commerce."

The petitioner in its brief in this case, on page 7 says:

"Petitioner *contended* in the court below, as will be seen from the opinion below (R. 114-116), *and still contends* that (even without the Iowa judgment) decedent was engaged in *intrastate* commerce *as a matter of law.*"

It will thus be seen that the railway company *litigated the issues of interstate commerce* in the District Court of Steele County, Minnesota, and still contends the work was intrastate.

Was decedent engaged in interstate commerce?

Was it an act of interstate commerce to set the brakes on the two interstate cars as the last act of the crew in question before going to dinner?

In the Rigsby case just quoted from, Rigsby was setting the brakes on some purely intrastate cars. The question involved in that case was whether the Safety Appliance Act applied regardless of the character of the commerce in which Rigsby was engaged.

In considering this question, the court used this language:

"Perhaps upon the mere ground of the *relation of his work* to the immediate safety of the main track, plaintiff's right of action might be sustained."

been many times decided, and under the adjudicated cases in this court, decedent was engaged in interstate commerce.

Taking it now as an established fact and established as a proposition of law that decedent *was* engaged in interstate commerce, *on the record presented to the District Court* of Steele County, Minnesota, and upon the record now presented to this court upon which the recovery is based, can the nature or character of decedent's employment be said to be intrastate *because of some other record?*

In other words, if we now assume that, upon the record before this court, decedent *was* engaged in *interstate commerce*, can it be said that his work was intrastate because of some other adjudication by some other tribunal?

The only tribunal having authority to hear causes under the Federal Act is a court as known and constituted generally at common law.

Who is to Determine Interstate Commerce?

Let us suppose the State of Iowa should by statute enact that an employee engaged in working about a car destined to a point outside the State of Iowa from the State of Iowa should be deemed to be engaged in *intrastate* commerce.

Could the Legislature by such pronouncement make an act *intrastate* which was in fact *interstate?*

To bring to the attention of the court an example where the question might be more likely to arise, let us suppose this state of facts—that the Legislature of a state, in order to stop the solicitation of orders by house to house canvassers for the sale of merchandise, should pass a law saying that the solicitation by a canvasser of sales of hosiery in one state, which hosiery was to be manufactured and delivered

from another state, should be deemed *intrastate* in character, and that such action should not be deemed to be in any way *interstate.*

Having *made this determination,* then let us assume that the state should attempt to tax such activity. Suppose the state should say, in substance, "We have decreed that certain acts are intrastate in character, and being intrastate, we have a right to tax them," and should thereupon impose the tax.

Suppose further that the matter were to come before this court with the claim by the party taxed that his business was *interstate* and not subject to regulation or taxation by a state.

Suppose the state should meet such argument by saying that the question of the nature of the business was not open for discussion: that the Legislature had determined that certain acts were *intrastate* and that determination is final.

This court would unhesitatingly say that the Legislature cannot say that certain acts shall be deemed done in *intrastate* commerce, if, *as a matter of fact, those acts constitute the doing of business in interstate commerce.*

Or, to state it another way, *this court will determine for itself what constitutes the doing of interstate business.*

While the court might accept the decision of a State Supreme Court as to what constituted doing business within that state, within the meaning of its own laws, a different proposition presents itself when the question arises as to *whether certain facts constitute the doing of business interstate in nature.*

As stated by Mr. Justice Butler in *Kansas City Structural Steel Co. v. State of Arkansas,* 46 Sup. Ct. 59:

> "But *this court will determine for itself whether what was done by plaintiff in error was interstate commerce*

and whether the state enactments as applied are repugnant to the commerce clause."

By the same line of reasoning, when an action is properly brought under a law of the United States in a court of competent jurisdiction, *that court will determine for itself* whether the work done by the plaintiff was interstate in character.

When the issue comes before this court, we submit that this court has the power of *determining for itself* whether what was done was work in interstate commerce or not.

Let us see where a contrary decision would lead us.

In a case where a record showed *conclusively* and even *concededly* that plaintiff *was engaged in interstate commerce* so as to be within the protection of the Federal statutes, the court might be placed in a position of saying that such work, even though admittedly interstate, would not bring into operation the Federal law because some Commissioner, *in a supplementary proceeding under a state statute*, had said that the work, which *was really interstate*, was *intrastate*, and because the Commissioner had said that interstate commerce was in fact intrastate, the court would be precluded from applying the Federal law.

The Supreme Court of the United States in *Real Silk Hosiery Mills v. City of Portland*, decided May 25th, 1925, 45 Sup. Ct. 525, held that the ordinance imposing a license tax on solicitors taking orders for hosiery to be shipped to buyers by a manufacturer in another state, burdened interstate commerce and was void.

The court quoted with approval from *Shafer v. Farmers' Grain Co.*, 45 Sup. Ct. 481, to the effect that though the theory of the law as expressed was to prevent possible frauds, this

would *not justify legislation which really interfered with the free flow of legitimate interstate commerce.*

Could the decision of this court have been *any different* had the city of Portland, by ordinance, or the State of Oregon, through its Legislature, *said* that the solicitation of such hosiery *should constitute intrastate commerce?*

This would, in effect, be to say that that which was square was in fact round, or that that which was *in fact interstate was intrastate.* Manifestly, this could not be done.

The question of interstate commerce in an action under the Federal Act must be determined by the tribunal before whom the action is pending and as Mr. Justice Butler said in the Kansas City case, *supra*:

> *"This court will determine for itself whether what was done by plaintiff in error was interstate commerce."*

Under the facts in the case at bar, the only conclusion the court can come to is that decedent Hope was engaged in interstate commerce.

There can, of course, be no question but that the state cannot interfere with interstate commerce under the guise of "regulation." As recently stated in *Alpha Portland Cement Co. v. Commonwealth of Massachusetts*, 45 Sup. Ct. 477:

> "It must now be regarded *as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business.*"

It is true that a state cannot call that *intrastate* which is *interstate* and *then* tax it or regulate it.

The same reasoning must apply in considering the question of interstate commerce, and the bearing of the Employers' Liability Act upon the relation and status of railway em-

ployees engaged in such commerce.

If a state may not *tax* interstate commerce under the *guise of regulating intrastate business*, as stated in the Alpha Portland Cement Co. case, neither may the state, under the guise of *regulating intrastate commerce, take away the right of an injured man given him or his surviving dependents under a Federal statute.*

In the case now before this court, Hope was engaged in interstate commerce, or he was engaged in intrastate commerce.

To what do we look to determine this question?

To the record in the case at bar. To the nature of the work he was doing, and, when we make that search and look into the nature and character of his work, its interstate status is plain.

This being so, *neither state regulation nor legislation can interfere.* It cannot interfere under the theory of regulating intrastate commerce, It cannot interfere under the *guise* of regulating *intrastate* commerce if the regulation or interference be in fact that of *interstate commerce.*

II. *Can proceedings under the State Workmen's Compensation Act, taken upon the initiation of the defendant after the commencement of an action under the Federal statute, interfere with, bar, or prevent a recovery under the Federal law on the theory that the Commission has found as a "fact" that decedent was engaged in interstate commerce?*

While what has been said heretofore relative to the attempt to burden interstate commerce by calling it intrastate commerce has some bearing on proposition two, the question will here be considered from the point of view of the supremacy of the Federal statute and whether the state can interfere with its operation.

THE FEDERAL ACT IS SUPREME.

At this late day it can hardly be said by any one that the Federal Act is not supreme, and that where Congress has taken possession of the field of interstate commerce, it is not supreme.

In the report of the Senate Committee on the Amendment to the Act of 1910, mention was made of the supremacy of the federal law, this language being used:

> "The federal law is imperative, mandatory and paramount over every foot of the soil of every state. It is in no sense foreign when its application or enforcement is sought in the courts of a state. *No policy of a state can impair its imperative obligation.* No official of a state sworn to support the Constitution of the United States can deny the enforcement of a statute of the United States, made in pursuance of the United States Constitution. Such law by the Constitution is made 'the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.'"

There is no question but that the Federal Act is superior to any state regulation and supersedes all state laws on the subject of the employers' liability in Interstate Commerce Cases. See *Seaboard Air Line Co. v. Horton*, 233 U. S. 492, 34 S. C. 635, 58 L. Ed. 1062; *Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327; *St. Louis, etc. Ry. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031.

In *Erie Ry. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, the facts briefly were that Mrs. Winfield made application for compensation under the New Jersey Compensation Act for injuries received by and resulting in the death

of her husband while employed by the Erie Ry. Co. in that state. It appeared that an employee was crossing certain tracks in the yards of the railway company, under circumstances which made his employment interstate, within the Federal Act.

The railway company was not, however, guilty of any *negligence.* Application for compensation was made, and it was claimed that the Employers' Liability Law provided for compensation *only* in the event that the railway company was *negligent;* that the railway company, *not being guilty of negligence* in the particular case, the Federal Act was without application and compensation could be made under the New Jersey law.

The Supreme Court of the United States, in an opinion by Mr. Justice Van Devanter, held that the Federal Act was paramount and exclusive and established rules and regulations intended to operate uniformly in all of the states.

It was said:

> "By the Federal Act the *entire subject,* as respects carriers by railroad and their employees in interstate commerce, was taken *without reach of state laws.* It is beyond the power of any state to *interfere with the operation of that act.*"

A similar situation arose in the case of *New York Railway Company v. Winfield,* 37 Sup. Ct. 546, 61 L. Ed. 1045, 244 U. S. 147. In that case it also appeared that Winfield was engaged in interstate commerce and was injured under circumstances *involving no negligence* on the part of the railway company.

He was awarded compensation under the New York Compensation Act and the award was set aside by the Supreme

Court of the United States. In this opinion it is clearly shown that *the Federal Act cannot be interfered with by state courts.*

We especially call the court's attention to the following reference in the above case to the reports of the congressional committees prior to the passage of the statute:

> "And the reports of the congressional committees, having the bill in charge disclose without any uncertainty that it was intended to be comprehensive * * * and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules, will be fixed by one rule in all the states."

Again it is said:

> "That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, K. & T. R. Co. v. Wulf,* 226 U. S. 570, 576, 57 L. Ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and other cases, it is pointed out that the subject which the act covers is 'the responsibility of interstate carriers by railroad to their employees injured in such commerce'; in *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59, 66, 67, 57 L. Ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, it is said that 'we may not piece out this Act of Congress by resorting to the local statutes of the state of procedure or that of the injury'; that by it 'Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce,' and that it is 'paramount and exclusive'; in *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 256, 58 L. Ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9

N. C. C. A. 109, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the Federal Act governs to the exclusion of the state law."

Let us go back and consider the language of Mr. Justice Van Devanter in *Erie R. Co. v. Winfield,* heretofore quoted.

> "By the Federal Act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken *without the reach of state laws.* It is beyond the power of any state to *interfere* with the operation of that act."

If the subject is *without the reach of state laws,* how can a commission, such as the Industrial Commission of Iowa, under the guise of determining a fact or determining a question of law, *deprive a citizen of an actual Federal right?*

As the record in this case now stands, Hope was engaged in interstate commerce. As Judge Senn stated in his memorandum:

> "The Iowa tribunal was *without authority* to render an order and judgment which is conclusive upon this court and which will *defeat a right given to the plaintiff by congress*" (591).

We could not say that the *entire subject was without the reach of the state laws* if it were left open to the Industrial Commission of Iowa to determine a fact question, which would take away the Federal right.

It matters little whether the commission attempts to take away the Federal right by determining a *question of law or* by determining a *question of fact.* If the employee, at the time was *in reality engaged in interstate commerce,* then

every act of the Iowa Industrial Commission was *void and of no effect whatever.*

The Federal Act being supreme and this not being open to any question, it must of necessity follow that *the State cannot interfere with the operation of the Federal statute in any way.*

The fact that the Federal statute with its rules and its remedies may be inconsistent with the public policy of the State would not permit the State, under the guise of public policy, to interfere with the operation of the act.

This phase of the question was presented to the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, M. & St. P. R. Co. v. Schendel,* 292 Fed. 326.

In that case, the railway company sought *to prevent a trial* of an action under the Federal statute in Minnesota.

The accident occurred in Iowa and the railway company procured an injunction from the Iowa court restraining witnesses from testifying in Minnesota and restraining them from giving evidence by deposition in Minnesota or elsewhere.

This was on the ground that the Federal statute was in conflict with the public policy of the State.

Judge Kenyon, speaking for the Circuit Court of Appeals, said:

> *"The Iowa public policy cannot destroy this Federal right. In a conflict between such policy and the Federal right given to a citizen of Iowa, the public policy must yield.* The Constitution and the laws made thereunder are the supreme law of the land, and are as much the law of the State as are the State enactments."

Speaking further of a State enactment which permitted the State to interfere with the operation of the Federal Act,

Judge Kenyon said:

> "The Act of the Iowa legislature, as construed by the Supreme Court of the State, *taking from an Iowa citizen the Federal right under the Employers' Liability Act to go into the United States Court and bring suit for injury,* or from his estate, if death results therefrom, *in any district in which defendant was doing business* at the time the action was commenced is unconstitutional, and the order of the District Court unauthorized and void. *It amounts to a nullification of the Federal statute.*"

It will be remembered that in *Erie R. Co. v. Winfield, supra,* Mr. Justice Van Devanter said:

> "It is beyond the power of any state to *interfere with the operation* of that act."

Did the Commission of Iowa *interfere with the operation* of the act?

The railway company did not institute these proceedings before the Commission until *after* the suit under "that act" (being the Federal statute) had been commenced in Minnesota. From the very start the proceedings before the Commissioner in Iowa were void.

The Federal statute is not only comprehensive but it is *exclusive.* No state can *interfere with, hamper* or *hinder* a citizen pursuing his rights under that statute.

It was said in the *Second Employers' Liability Cases,* 232 U. S. 1, 56 L. Ed. 327:

> "The existence of the jurisdiction creates an implication of duty to *exercise it,* and that its exercise may be onerous does not militate against that implication.
>
> The suggestion that the act of Congress is not in

harmony with the policy of the State, and therefore that the *courts* of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist."

We have a situation, therefore, where the State court of Steele County had jurisdiction and was obliged to exercise that jurisdiction.

In an attempt to defeat the Federal jurisdiction, the railway company, which had already been sued in the present proceedings, instituted a proceeding against one of the beneficiaries named in the complaint and asked that the Industrial Commission of Iowa determine that this beneficiary receive compensation under the Compensation Law of Iowa.

This scheme to defeat Federal recovery cannot succeed. Otherwise the Federal statute, as stated by Judge Kenyon, *would be nullified.*

Any act of that Commission attempting to *limit* the Federal right was *void* and inoperative because in conflict with the law of Congress.

The Legislature of Iowa or the State of Iowa, acting in its sovereign capacity, could not, by any enactment, limit or restrict the right given by Congress.

This being so, the Industrial Commission, a *subordinate arm* of the State, could not do that which the State could not do in its *sovereign capacity.*

There is no escape from the conclusion that the right of recovery under the Federal statute cannot be defeated by the Industrial Commission; nor has that Commission power to *hinder, delay* or *interfere* with a citizen prosecuting a Federal right.

Although counsel for appellant in this case seem to con-

by State Compensation Acts.

In the case of *Washington v. Dawson*, 264 U. S. 218, 68 L. Ed. 646, Mr. Justice McReynolds referred to the case of *Southern P. R. Co. v. Jensen*, 244 U. S. 205, saying:

> "* * * The work of a stevedore, in which the deceased was engaging, is *maritime in its nature;* his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transp. Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 58 L. Ed. 1208, 1211, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. 733. *If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute*, other states may do likewise. The necessary consequence would be *destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish.*"

To the same effect is *Robins Dry Dock & Repair Co. v. Dahl*, 45 Sup. Ct. 157, in which it was held by this court that

> "repair work on a completed vessel has *a direct relation to navigation*, and the *rights* and *liabilities* of the parties *depend on the general maritime law*, and *cannot be enlarged or impaired by state statutes.*"

Conflict of Workmen's Compensation Act With Federal Statute.

Passing from the general proposition that the Federal Act is supreme, we wish to call the court's attention to several rulings wherein the question of the interference by a state,

through Workmen's Compensation Acts, with rights given by a Federal statute have been involved.

In many of these cases the claimed Federal rights arose under certain of the Safety Appliance Acts of Congress.

These Safety Appliance Acts do not, in and of themselves, confer a right to maintain a private action to recover damages for injuries, but are in the nature of penal statutes.

In some of the cases, it was contended that an employee could be put to an election whether he would rely on a State Compensation Act or on a Federal statute.

In some places *the law* made the election for the employee.

In *Erie R. Co. v. Winfield*, 244 U. S. 70, 61 L. Ed. 1057, *supra*, the question of an election by an employee was raised, it being claimed that an employee was presumed to have made such election.

In this case, Mr. Justice Van Devanter said:

> *"But such a presumption cannot be indulged here, and this for the reason that by the Federal Act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the state laws. It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."*
>
> See 61 L. Ed., page 1065.

In *Hogan v. New York C. & H. R. Co.*, 139 C. C. A. 328, 223 Fed. 890, 12 N. C. C. A. 1050, it was held that the Federal Act supersedes State legislation, and that an employee engaged in interstate commerce

"has only one remedy, namely, that under the Federal Act and is not, *by bringing and discontinuing an action under a State statute*, barred by the doctrine of election of remedies, from subsequently bringing *an* action under the Federal statute."

In that decision the following language of Mr. Justice Holmes, then Judge of the Massachusetts Supreme Court, from 156 Mass. 193, 30 N. E. 691, is quoted:

"Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. *Metcalf v. Williams*, 144 Mass. 452, 454 (11 N. E. 700). But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule. *Butler v. Hildreth*, 5 Metc. 49, 52; *Snow v. Alley*, 144 Mass. 546, 554, 560 (11 N. E. 764, 59 Am. Rep. 119); *Whiteside v. Brawley*, 152 Mass. 133, 135 (24 N. E. 1088); *Morris v. Rexford*, 18 N. Y. 552, 557."

See 12 N. C. C. A., page 1055.

In *Waters, et al. v. Guile*, 234 Fed. 532 (C. C. A., 6th Circuit), the question was raised as to the supremacy of the State or Federal statutes.

In that case it appeared that after the accident, plaintiff's wife applied to the Industrial Board of Michigan and signed a claim expressed to be under that Act. Two certain notices addressed to the railway company, claiming compensation under the act were signed by her husband, the plaintiff. One copy was sent to the defendant, and the other was returned to the Industrial Board.

The defendant took the matter up and prepared to settle on a basis of the average weekly wages. A dispute arose because of the amount of the average wages, and the settlement was not in fact carried out, nor was arbitration asked for under the Act.

In this situation, the Circuit Court was of the opinion that the Federal Act must govern. Knappen, Circuit Judge, in writing the opinion, spoke of two inconsistent remedies and of the fact that the deliberate choice of one remedy by the servant might bar him from pursuing the other remedy. However, Judge Knappen said:

> "But election presupposes a *choice* of remedies, and where there is but *one remedy* available, there can be *no choice* of remedies and an unsuccessful pursuit of a *non-applicable remedy would not bar a resort to a remedy that is applicable.*"
>
> See 234 Fed., page 536.

The trial court, as a matter of law, found that the employee *was* engaged in *interstate* commerce, and in view of this, Judge Knappen said:

> "The Federal Act thus provided plaintiff's sole and exclusive remedy for his injuries. His *mere claim under the Michigan Act*, not prosecuted to recovery, was thus not an effective election as against a remedy under the Federal Act."
>
> See 234 Fed., pages 536-537.

In the case at bar, Mrs. Hope did not make a claim under the Federal statute. She asserted no rights under the State statute. She asked nothing from the Compensation Board of Iowa other than that the Board leave her alone and not

interfere with the action of the administrator under a law of the United States.

She certainly cannot be deemed to have elected to take compensation under the Iowa statute. She could not make an election for the administrator.

In *Erie R. Co. v. Linnekogel*, 238 Fed. 389, the Circuit Court of Appeals for the Second Circuit said:

> "The assertion that a recovery under the Federal Act here invoked *can be in any way modified by the Workmen's Compensation Act* of the state in which the accident happened *certainly lacks authority.* It seems to us *unsustainable upon the reason of the matter.* It is the essential nature of any compensation act that it *does not depend upon or is not invoked as the result of an act of negligence.* What is assured to the workman thereby is not compensatory damages for a tort, but *a species of insurance* against hurts received in the line of occupation without (perhaps) anybody's fault. But Section 1 of the Liability Act (35 Stat. 65) declares that common carriers shall be liable 'in damages' for injuries due to their 'negligence.' These *words refer to a course and habit of litigation only too well known for some generations* and must be interpreted accordingly. *Damages mean what juries* assess according to their own views of value, and the act authorizing such damages *supersedes all state laws* relating to the same subject."

In *Director General v. Ronald*, 265 Fed. 138, it was said by Manton, Circuit Judge, concurring in an opinion of the Circuit Court of Appeals of the Second Circuit, that if the Federal Safety Appliance Act created a liability,

"The Workmen's Compensation Act * * * has no application. *To allow the State Act to interfere would destroy the uniformity of the acts throughout the United States*, and would result in weakening the force and effect of the Acts of the several states."

Let us suppose that Hope was killed by a violation of the Safety Appliance Act relating to automatic couplers; that he was killed in Iowa; and that he was *not* engaged in interstate commerce.

The position of the railway company, to be consistent, would be that his rights were governed by the Compensation Act and that although they arose out of the Federal statute, the Compensation Act would govern.

This is not the law and is inconsistent with the Ronald case just referred to.

In *Ross v. Schooley*, 257 Fed. 290 (certiorari denied, 249 U. S. 65, 63 L. Ed. 803), it was held that an employee *not* engaged in interstate commerce *could recover if injured by reason of a violation of the Federal Safety Appliance Act.*

It was further held that the Workmen's Compensation Act of Illinois *could not affect his right of recovery*, the court saying:

"*A state legislature, therefore, has no more power to curtail the Federal right of an employee than of a traveler.*"

In the Ronald case, Judge Manton further said:

"It is beyond the power of any state to *interfere* with the *operation* of a Federal Act such as putting carriers and their employees to an election between its provisions and those of the New Jersey Compensation Acts (P. L. 1911, p. 134, as amended by P. L. 1913, p. 309) or im-

puting an election to them through a statutory presumption. The Federal Act is intended to operate uniformly in all the states as respects its application, rights and remedies conferred, and is therefore paramount and exclusive. *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. A like result was reached in *Devine v. Buffalo R. & P. Ry. Co.*, 253 Fed. 948, 165 C. C. A. 390 (Third Circuit), and *Ewing v. Coal & Coke Ry. Co.*, 82 W. Va. 427, 96 S. E. 73, certiorari denied, 247 U. S. 521, 38 Sup. Ct. 583, 62 L. Ed. 1246."

In *Flanigan v. Hines*, 193 Pac. 1077 (Kansas), it was held that the amount of damages recoverable in an action predicated on the Federal Safety Appliance Act could not be governed by the Workmen's Compensation Act.

In its consideration of this matter, the court said:

"This court concludes that the redress of injury contemplated by the Safety Appliance Act is *full redress* by way of *damages*, and not merely the *recompense* afforded under the Workmen's Compensation Act, *which bases compensation on a theory incompatible with that of damages occasioned by fault.*"

In *Ward v. Erie R. Co.*, 129 N. E. 886, 230 N. Y. Sup. 230, it was held that the Federal Safety Appliance Act gave a right of action which could not be destroyed by a State Workmen's Compensation Act.

In speaking of the statute in that case, the court said:

"The statute in scheme and framework is instinct with plan and purpose to maintain a remedy and fortify it. The *will of Congress* is expressed in abbreviated signs and symbols, but *none the less it is expressed.*

> Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, *should be dependent for its efficacy upon the pleasure of the states.*"

The State, through its Compensation statutes, may not interfere with a right arising out of one of the Federal Safety Appliance Acts.

This is true, although the employee be *not* at the precise time of his injury *engaged in interstate commerce* so as to bring him within the provisions of the Employer's Liability Act.

This was the substance of the holding in *Texas & P. R. Co. v. Rigsby, supra*, and in *Ross v. Schooley*, 257 Fed. 290.

Taking this as a fact, that where the action arises out of a Federal statute the State *cannot* interfere, *even though the work be not interstate*, it would be extremely illogical to say that where the work is *in fact interstate* and the action is based on the Employer's Liability Act, the Commissioner can make an *adjudication* of interstate commerce, and *then* interfere with the Federal right.

In the cases under the Safety Appliance Act, the work *is* intrastate.

If in those cases, the Commissioner made an *adjudication* of intrastate commerce, it would be of *no effect*, and the mere determination of a *moot question*, where it was not *claimed* that an employee was engaged in interstate commerce.

It might as well be said in that class of cases that because the work *was* intrastate, the Compensation Act would apply.

In the case at bar, the *adjudication* of intrastate commerce by the Commissioner, when the plaintiff claims a Federal

right, makes the situation analagous to that in a case under the Safety Appliance Act where plaintiff *concedes* his work to be intrastate.

In such Safety Appliance, intrastate cases, the Commission may not interfere. Neither can it interfere because of the adjudication of intrastate commerce by the Commissioner.

The Claim of Collateral Attack.

It being apparent from what has been said that the Federal Act generally speaking, is supreme, that states cannot interfere with remedies growing out of the Federal Safety Appliance Acts, even though no direct right of action be conferred thereby, and even though the employe be not engaged in interstate commerce, and it being beyond dispute that the Federal statute is paramount and exclusive, we come to the question of whether or not the exclusiveness of the Federal statute is lost, whether the supremacy of the paramount Federal right can be denied *under the guise of res judicata or estoppel.*

We contend that this cannot be.

Mr. Justice Dibell, in speaking for the Minnesota court, correctly expressed it when he said, in substance, that it *would be unseemly* to permit a Compensation Board, where the *proceedings are summary*, to quickly *swing into action and defeat a previously asserted Federal right.*

The states cannot defeat this right directly. To permit it to be defeated under the guise of estoppel or *res adjudicata* is to permit that to be done indirectly and in a round-about way, which the court would not permit to be done directly and in a straight-forward way.

If, under the guise of estoppel, the State can prevent the

exercise of a Federal right, that right *is as much prevented and denied to an employee as though the State had directly denied it to him.*

It makes little difference to an employee whether the State takes this course by *legislative enactment*, by *judicial decree*, or by *act of a Compensation Commissioner.*

All the employee knows is that the right Congress has given him has been taken away by the State.

Although an employee attempts to prevent this, his efforts being of no avail, because of the action of the Commission in giving no heed to the Federal statute, it is said that by this method, the Federal Act can be circumvented.

In other words, the law of Congress may be nullified.

This cannot be. The Supreme Law need not yield to a subordinate statute.

No Equitable Estoppel.

Under the equitable doctrine of estoppel, the estoppel must be mutual. If we consider this question of mutuality for a moment, it will be apparent that there is no such mutuality.

Suppose in the Compensation proceedings, the Commissioner of Iowa had made an adjudication of *interstate* commerce, and that it had secured an affirmance of this adjudication by the District Court of Iowa, ripening the confirmation into a judgment.

Assume, then, that the personal representative—the only one who could bring the action under the Federal statute, had commenced a proceeding to recover damages on the theory that the employee was engaged in interstate commerce.

Assume that the personal representative made no proof of interstate commerce, but *offered in evidence the finding of the Commissioner to the effect that the employee was engaged in interstate commerce.*

Interstate commerce, like any other question under the Federal statute, must be affirmatively shown. Would this "*proof*," made by a "finding" in a proceeding in which the plaintiff was not a party, in a summary proceeding wherein a Compensation Commissioner had held decedent to be engaged in interstate commerce, be sufficient? Would this finding do away with the necessity of proof as known at common law?

Manifestly the plaintiff could not rely upon such adjudication, such proof.

Should the railway company contest the question of interstate commerce, it would avail plaintiff little to say that the railway company was estopped from making a contest because of the previous adjudication.

In the State of Mississippi it was provided, by legislative enactment, that under certain circumstances, a death would be *presumed* to have been caused by the *negligence* of the employing railway company.

The State act is known as the "*Prima Facie* Negligence Statute."

This court in an action where the statute was set up, held that negligence was *an essential element which had to be proved under the Federal statute*, and that the State could not, by a legislative enactment, *do away with the proof required* in order for plaintiff to recover.

New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 62 L. Ed. 1167.

Neither could the plaintiff, in the supposititious case just

referred to rely on the *finding* of the Industrial Commissioner and offer this in evidence *in lieu of proof* that decedent was engaged in interstate commerce.

If the adjudication as to the commerce in which decedent was engaged could not be offered by *either party* as proof, clearly there is a lack of mutuality. It could not constitute "proof" under the Federal Act, hence it could not operate as a bar.

It can hardly be said that there is an *equitable* estoppel when there is *entire lack of equity* in the claim of the railway company.

Counsel concede that estoppel by judgment *in the broad sense* cannot be invoked, but claim that the court should have invoked the equitable doctrine of estoppel by *verdict*—that is, estoppel to question the matter of interstate commerce because of the finding of the Commissioner that the work was *intrastate*.

There was *no verdict* in the case, as is known at common law. The finding in Iowa was by the Industrial Commissioner.

If there be no estoppel by judgment, but the claim merely be made that the estoppel is by verdict, then the claimed constitutional question in this case falls.

The question of whether or not there is an estoppel by reason of the act of the Iowa Commissioner cannot raise a constitutional question under the full faith and credit clause.

The act of the Commissioner in making a finding cannot be called a judgment, and if the estoppel be merely by reason of this *finding*, then it presents solely a question for determination by the State court.

The full faith and credit clause pertains only to the judg-

ments and *judicial* acts and proceedings of a sister state. The finding of the Commissioner is only *a conclusion by an administrative officer.*

What is the Finding of the Commissioner?

Much has been said in this proceeding relative to the finding of *the fact of interstate commerce.*

Strictly speaking, the Industrial Commissioner of Iowa did not find any fact, but rather came to *a conclusion of law* to the effect that Hope was engaged in intrastate commerce.

By this conclusion of law of the Commissioner, the plaintiff in the action under the Federal statute, could not be bound.

A conclusion of law by a Compensation Commissioner cannot be said to constitute *res adjudicata* as to the question of interstate commerce.

There could be no estoppel because of a finding of fact. The same facts were not before the Commissioner as were submitted to the District Court, in the case under the Federal statute.

Most startling consequences would result if the Compensation Commissioner of Iowa could be said to have power to *nullify the Federal Act* by rendering a decision before a court could get around to try a case under the Federal statute, proceeding according to the course of the common law.

The railway company says that Mrs. Hope should have continued the fight in Iowa.

It will be remembered that the *Special Administrator was not a party to the Iowa proceedings*, and also that Mrs.

Hope, while the beneficiary, was *not a party plaintiff in the Minnesota proceeding.*

Assuming that Mrs. Hope might have proceeded further in trying to stop the Commissioner from awarding her compensation in Iowa, it could be said with equal propriety that the railway company had a remedy in Minnesota—by applying to the Supreme Court and asking for a Writ of Prohibition to prevent the trial of the action in the District Court of Steele County, Minnesota.

We cannot escape the conclusion, on this branch of the case, that the Federal Act cannot be modified, hindered or interfered with by any Compensation proceeding.

This general proposition is agreed to by the railway company, but it is said that the interference by the State is permissible because of the doctrine of estoppel and *res adjudicata.* This does not answer the question. If the State cannot directly interfere with the operation of the Federal Act, it is prevented from interfering with it regardless of what method may be devised. It is the *fact of the interference*, and not the *means*, that is prohibited.

It seems irregular to resort to the Compensation Act in an attempt to defeat a Federal right, and then come into this court and make an assertion that under the full faith and credit clause of the Federal Constitution, due effect is not given to the acts and decrees of a sister state.

In putting into operation the Compensation proceedings, under the circumstances, the railway company was *running counter to the statutes of the United States*, the supreme law of the land.

From the *moment the Federal right was asserted*, the Commission was without power, right or authority to continue with the case.

The situation is not unlike that presented in the District Court in the trial of an action wherein facts are asserted which would give to a defendant the right to remove his case to the Federal Court.

The minute these facts are made to appear, the right to remove arises, and a State court can no longer proceed.

While it is true that there is some difference in the statutes, nevertheless the same reasoning prevails here, and when *a Federal right has been first asserted and an action commenced in a common law court to recover under the Federal statute*, it cannot be that a Compensation Commission, by reason of proceedings initiated before it by the adverse party can *take the cause away from the common law court* and cause the matter in that court *to be held in obeyance until the determination by the Compensation Board.*

This sort of a proceeding *would make the Board superior to the courts, would* make the State statute paramount, the Commissioner supreme.

It is more reasonable and logical to say that when the Federal rights are first asserted in the common law court, a Compensation Commission is without any power or jurisdiction over the subject matter.

In this connection, it is to be borne in mind that while the Compensation Commission did acquire jurisdiction over *Mrs. C. Y. Hope*, it had *no jurisdiction over the subject-matter of the controversy.* It had no jurisdiction of the Federal cause of action. It had no jurisdiction over the Special Administrator.

The cause of action under the Federal statute could vest only in the personal representative. The Commission never acquired any jurisdiction over the personal representative,

nor the cause of action controlled by him.

Not having such jurisdiction, it was without power to act in any way so as to bind the personal representative, or interfere with his cause of action.

The proceedings under the State Act were entirely void and of no effect.

No Identity of Parties.

Passing the point that the Industrial Commission of a state cannot initiate proceedings *so as to destroy a right given under the Federal statute*, and *assuming* generally for the purpose of the argument, that the Commission *might in some cases have the power to nullify the Federal statute*, we next come to the question of whether or not there was *identity of parties* in the two proceedings, so that the nullification could be accomplished.

It will be recalled that the Iowa proceeding was entitled: "In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant v. Chicago, Rock Island & Pacific Railway Company, Appellee" (484-485).

The action under the Federal Act was entitled: "A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, Plaintiff v. Chicago, Rock Island & Pacific Railway Company, Defendant."

Is there identity of parties?

The word, "identity" is defined in Funk & Wagnall's New Standard Dictionary as follows:

> "The state or quality of being identical or absolutely the same."

There is no identity of parties in the present case and the

proceedings in Iowa; neither is there identity of subject-matter.

The trial court was of the opinion that the question of estoppel and *res adjudicata* was disposed of by the Troxell case, 227 U. S. 434, 57 L. Ed. 586, and other cases cited in his memorandum (585, 586, 590).

The present action is brought by A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased. The proceeding instituted in Iowa was instituted "In the Matter of C. Y. Hope, deceased" (Exhibit A, 428).

Through some change of which we are not advised, the case appears in Exhibit D, which is the arbitration finding by the Industrial Commission, as "Mrs. C. Y. Hope, Claimant v. Chicago, Rock Island & Pacific Railway Company, Defendant" (439).

Later Mrs. C. Y. Hope appears as appellant (472-476) and the railway company as appellee.

The judgment in the District Court is "In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant" (484).

Is a judgment in the proceeding, as last entitled, a bar to the prosecution of the action by A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, because of identity of parties?

A very interesting case on the question of identity of parties is the case of *Ingersoll v. Coram*, 211 U. S. 335, 53 L. Ed. 208. This case is not exactly in point as to facts, but is very much in point on the proposition of identity of parties where an administrator is involved.

This case very clearly lays down the rule that an administrator in one state is not in such privity with an administrator in another state, that a judgment for or against

one on the same cause of action will bar the prosecution of a claim by the other.

Robert G. Ingersoll, in his lifetime, entered into a contract with certain parties to contest a will in Montana. The contest was to be made upon the basis of a contingent fee. There was a disagreement on the part of the jury on the first trial, and, pending a second trial, the matters involved were adjusted and Ingersoll's clients received a large amount in the settlement. Subsequently Ingersoll died and his wife, the plaintiff, was appointed administratrix of his estate in New York. As such administratrix she commenced an action in Montana to impress a trust upon the assets of the estate to the extent of the interest of her husband on account of fees. At the threshold of the case she was met with the objection that a foreign administratrix could not maintain the action, and she thereupon applied for the appointment of a local ancillary administrator. The application was granted and the ancillary administrator was substituted as party plaintiff. Upon the trial of the case the defendants objected to the introduction of any evidence on the ground that the bill did not state a cause of action. This objection was sustained and judgment entered for the defendant.

Later, it being discovered that there were assets of the estate in Massachusetts, Mrs. Ingersoll, as administratrix, commenced an action in that state of the same character as the one in Montana. In this action the Montana proceedings were set up as a bar to the proceedings in Massachusetts. We now quote the answer of the Supreme Court of the United States to the contention made:

> "Respondents assert the identity of the action in Montana with the present suit, and upon that identity they urge that such action constitutes *res judicata*. Peti-

tioner denies the identity of the action, and urges besides that there is no such privity between the parties as to make the Montana action *res judicata* of the pending case. In support of the latter contention petitioner urges that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and that therefore a judgment against one is not a bar to a suit by the other. And this was the ruling of the Circuit Court. The Circuit Court of Appeals took the contrary view, and rested its judgment upon the conclusive effect of the Montana action. We shall assume that there is identity of subject-matter between the Montana action and that at bar, but the question remains: Was there identity of parties? An extended discussion of the question is made unnecessary by the case of *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966. In that case a suit in equity against Fletcher, brought in his lifetime, was revived after his death, and a decree obtained. Fletcher resided in Michigan, where he died, leaving a will, which was duly probated in the Probate Court of Wayne County, in that state, in which the decree of the Massachusetts court was filed as evidence of a claim against the estate. Its effect as such was denied, and the case was brought here by writ of error. Replying to the contention of the plaintiff in error, that the Michigan executor and the administrator with the will annexed of Fletcher's estate in Massachusetts were in such privity that the decree was conclusive evidence of it in the proceedings in Michigan, this court held that the decree was not binding upon the Michigan executor, or the estate in his possession, citing *Vaughan v. Northrup*, 15 Pet. 1, 10 L.

Ed. 639; *Apdeu v. Nixon*, 4 How. 467, 11 L. Ed. 1059; *Stacy v. Thrasher*, 6 How. 44, 12 L. Ed. 337. The later case was quoted from as follows: 'Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator. See *Story Conflict of Laws*, Sec. 522; *Brodie v. Bickley*, 2 Rawle, 431.' *McLean v. Meek*, 18 How. 16, 15 L. Ed. 277; *Johnson v. Powers*, 139 U. S. 156, 35 L. Ed. 112, were also cited, and it was said that the doctrine was in force in Massachusetts.

"Respondents insist that this doctrine has no application to the Montana judgment, and urge that the latter is a bar of the pending suit (1), because it was a judgment on the merits, and (2), because such a judgment 'against an ancillary administrator in the suit brought by him is conclusive as to that cause of action against the domiciliary, or any other ancillary administrator.' And this is said to follow from the proposition which respondents advance that 'the authorized act of an ancillary administrator as to the property of the intestate within his jurisdiction is binding everywhere'; and it is hence conclusive that a suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property. That the argument by which this conclusion is supported has strength is established by the fact that the Circuit Court of Appeals yielded to it, and it is said to be sanctioned by *Biddle v. Wilkins*, 1 Pet. 686, 7 L. Ed. 315; *Wilkins v. Ellett*,

108 U. S. 256, 27 L. Ed. 718; *Talmadge v. Chappel*, 16 Mass. 71. But as these cases preceded *Brown v. Fletcher*, they must be regarded as consistent with it. Besides, in that case *Johnson v. Powers*, 139 U. S. 156, 35 L. Ed. 112, was cited as establishing on the authority of *Apdpen v. Nixon*, and *Stacy v. Thrasher*, *supra*; *Low v. Bartlett*, 8 Allen 259, the doctrine that a judgment recovered against the administrator of a deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. That there is a certain amount of artificiality in the doctrine was pointed out in *Stacy v. Thrasher*, and that it leads to the inconvenience and burdensome results of retrying controversies and repeating litigations. The doctrine, however, was vindicated as a necessary consequence of the different sources from which the different administrators received their powers, and the absence of privity between them, and that the imputations against it were not greater than could be made against other 'logical conclusions upon admitted legal principles.' It is not necessary, therefore, to review in detail the argument of respondents. Its fundamental concept is that the authorized act of an administrator as to property of the intestate within his jurisdiction is binding everywhere, and it is said that a suit brought by an administrator is subject to the same principle. The generality of the conclusion, however, counsel immediately limits by the concession that it does not include a suit brought against an administrator, whether he success-

fully or unsuccessfully defends it. In other words, the principle is true only of an action brought by the ancillary administrator to enforce a claim in behalf of the estate, and judgment goes against him. But counsel even limits this again, and says it would not be binding 'in the sense of creating a personal liability for costs, if costs be awarded, or otherwise, but it is binding in the sense that the cause of action has been effectively disposed of.' That is, as counsel explains, merged in the judgment. We do not think that the doctrine announced in *Brown v. Fletcher*, *supra*, admits of these distinctions, and surely the estoppel of a judgment must be mutual. The argument of respondents contends for the contrary; it makes a judgment against an ancillary administrator binding against other administrators, but not binding for them. We think, therefore, that the Montana judgment is not a bar to the pending suit."

It would be difficult to find a stronger case on the question of identity of parties and *res judicata* than the Ingersoll case.

It is to be noted that the court assumes identity of subject-matter, and that it asks the question, "Was there identity of parties?"

This question is answered by the holding that there was no such identity of parties and no such privity as would permit the judgment against one to bar an action against the other.

The court admits that there may be some artificiality in the doctrine but, nevertheless, lays down the rule that there is no privity between the administrator in one state and an administrator in another state.

The trial court was of the opinion that the case of *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, determined the question of identity of parties.

In that case, the opinion was written by Mr. Justice Day. The action was brought by Lizzie M. Troxell, administratrix of the estate of Daniel Troxell. Plaintiff recovered a verdict in the court below and judgment was entered thereon.

The Circuit Court of Appeals reversed the judgment and the case then came to the Supreme Court of the United States.

It appears from the opinion that "Lizzie M. Troxell (now the administratrix of his estate) brought a previous action, suing as surviving widow, and joining the two living children, against the defendant railway company for damages."

She recovered a verdict and judgment was entered in her favor, but this was reversed by the Circuit Court of Appeals.

After this reversal, Lizzie M. Troxell was appointed administratrix, and brought an action to recover as administratrix. She again recovered a verdict and judgment was entered thereon.

The Circuit Court of Appeals reversed the judgment on the ground that the first proceeding and judgment constituted a bar to the maintenance of the second action. In other words, the Circuit Court of Appeals held that the judgment in the case of Lizzie M. Troxell against the railway company was a bar to the prosecution and recovery of the claim of Lizzie M. Troxell, as administratrix.

While there was an allegation which tended to show interstate commerce in the first case, the question was not presented to the jury and the case was "tried on the theory that it involved a cause of action under the state law of Pennsylvania."

The court then said:

> "To work an estoppel the first proceeding and judgment must be a bar to the second one, because it is a matter already adjudicated *between the parties.*"

The court then spoke of the *difference between the action under* the *State* law and the action under the *Federal* law, and said:

> "The cause of action under the State law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a *different theory* of the right to recover than prevails under the Federal statute."

The court then cited *Ingersoll v. Coram, supra*, and *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966, which was referred to and quoted from in the Ingersoll case, saying:

> "Furthermore, it is well settled that to work an estoppel by judgment there must have been *identity* of parties in the two actions."

The court stated the position of the Circuit Court of Appeals as follows:

> "The Circuit Court of Appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were *essentially* the same in both actions (the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children); and held that, except in mere form, the actions were for the benefit of the same persons, and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical, and would have been curable by amendment."

The court then referred to *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879, to which we shall hereafter refer. Following that reference this statement was made:

> "We think that under the ruling in the Birch case *there was not that identity of parties in the former action by the widow and the present case, property brought by the administrator under the Employer's Liability Act*, which renders the former suit and judgment a bar to the present action."

There was in the Troxell case a concurrence in the opinion of the court by Mr. Justice Lurton, "solely because *of the lack of identity of the parties* in the two actions."

In the case of *American R. Co. v. Birch, supra*, the Supreme Court of the United States held that the action could be maintained only by the personal representative. The action was commenced by the widow, Ann Elizabeth Birch. The defendant contended that an administrator should have been appointed to prosecute the action.

Mr. Justice McKenna, who delivered the opinion of the court, said:

> "In the present case it looks like a *useless circumlocution* to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used. * * * *The national act gives the right of action to personal representatives only.*"

The judgment in favor of Mrs. Birch was accordingly reversed.

From the Troxell and Birch cases, the rule does not seem open to question.

Mrs. C. Y. Hope could not have maintained an action as widow under the Federal statute. Had she brought such an action the complaint would have been subject to demurrer.

The proceeding instituted by the railway company in Iowa to compel Mrs. C. Y. Hope to take compensation under the Iowa statute *is not the same* action as one by the personal representative.

There is no privity under the decision of the Troxell case and the Ingersoll case, *supra*.

As before stated, *the parties are not the same*, and under the Ingersoll and Troxell cases, they were not in privity.

It is a fundamental rule of law that there can be no estoppel by judgment or verdict unless the action be between the same parties or their privies.

The Troxell case was approved in the case of *Meyers v. International Co.*, U. S. Adv. O. No. 3, page 100, December, 1923. That was a bankruptcy proceeding and there the court held that the decision of the bankruptcy tribunal could be binding only on parties or their privies.

The Circuit Court of Appeals for the Second Circuit in a case like the one at bar also held that there was no identity of parties, following the reasoning of the Troxell and Ingersoll cases, *supra*.

See *Dennison v. Payne*, 293 Fed. 333.

In that case, the case of *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966, upon which the Ingersoll case was largely based, is referred to with approval.

The Dennison case also followed the Troxell case, *supra*. The court held that there was no identity of parties be-

tween the plaintiff in the Dennison case before the Federal Court and the plaintiff in the Compensation proceeding.

In the Dennison case, it appeared that the action was brought in a common law court under the Federal statute to recover damages for the death of an employee.

Plaintiff, after commencing the suit to recover damages under the Federal statute, also, in her individual name, *filed a petition* to be awarded compensation under the Pennsylvania Compensation Act.

The referee in the Compensation proceeding made an award to the plaintiff and also found specifically that decedent was engaged in intrastate commerce. This was done before the action under the Federal statute came to trial. The award was pleaded as a bar.

The Circuit Court of Appeals held that there was *no identity of parties* in the two proceedings and hence the *one could not be a bar to the other.*

It will be noted that in the Dennison case, *the claimant sought recovery herself* and was awarded recovery under the Compensation Act.

The trial court held that there could be no recovery in the case prosecuted under the Federal statute because of the award of the Compensation Board, and because decedent was not engaged in interstate commerce. This holding was overruled by the Circuit Court of Appeals.

In speaking of the Troxell case, 227 U. S. 434, the Circuit Court of Appeals said:

> "*We are unable, in principle, to distinguish that case from the present suit.* The fact that the plaintiff in the present suit obtained a decision *in her favor* on the cause of action involved in the suit which she brought before the state board, while in the Troxell case the

plaintiff was *defeated* in the first suit, *can make no difference in the result*, as the case turned upon the fact that there was *not an identity of parties in the two actions.*"

The court further said:

"As was said by Mr. Justice Lamar, speaking for the court in *Lyon v. Perin Manufacturing Co.*, 125 U. S. 698, 700, 8 Sup. Ct. 1024, 1025 (31 L. Ed. 839):

'It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz.: (1) *Identity in the thing sued for;* (2) *identity of the cause of action;* (3) *identity of persons and parties to the action;* and (4) *identity of the quality in the persons for or against whom the claim is made.*'

In the present suit there was *not identity of parties*, and *that is sufficient* to make the doctrine of *res judicata* inapplicable. As in our opinion the plaintiff's intestate was engaged in interstate commerce at the time of his death, and as the proceedings before the Pennsylvania state board were not between the same parties, they therefore cannot estop the plaintiff from maintaining the present suit. Error was, in our opinion, committed in the court below."

The Dennison case is one of the cases referred to in the brief of petitioner herein, on page 19, and also on page 6 of its Petition for Writ of Certiorari, wherein petitioner, referring to the decision of the Minnesota Supreme Court, said:

"The only two authorities in the country squarely in point hold contrary to the conclusion reached."

Citing *Williams v. Southern P. R. Co.*, 202 Pac.

356, 54 Cal. 571 (Certiorari denied, 258 U. S. 622). *Dennison v. Payne*, 293 Fed. 333 (C. C. A., 2nd Circ.).

Later on in its brief, petitioner qualifies this statement by *criticising the Dennison case* because of the holding of lack of identity of parties.

The case is upheld by petitioner so far as it is authority for holding that a fact once determined by a body of competent jurisdiction cannot thereafter be reexamined.

Respondent's position here is that the cause of action was not the same in the two cases; that there was no identity of the thing sued for; that there was no identity of parties, and that the doctrine of *res adjudicata* could not apply.

It would indeed seem strange that the railway company might prevent the prosecution of this action *because of a suit brought by it* or *a proceeding initiated by it against Mrs. Hope* who was *not a party to the present action.*

ESTOPPEL—RES ADJUDICATA.

The petitioner in the case at bar qualified its claim by making the general statement that though the Iowa proceeding be not a bar in entirety, it is nevertheless a bar *so far as the finding of fact* of intrastate commerce is concerned.

If the judgment be not a bar *in its entirety* but merely a bar *as to that particular fact*, it is *just as much a bar as though it were a bar in entirety.*

The fact of interstate commerce had to be proved by the plaintiff. If plaintiff was barred by the Iowa adjudication of *intrastate* commerce, *plaintiff's whole cause of action had to fall.*

On the question of *res judicata*, counsel cite a number of

cases. It is to be noted that in all of these cases, where it is said a judgment in a previous action is *res judicata* as to a fact litigated in that action, there is a further statement that this doctrine applies to another action "*between the same parties*," or "upon the same matter."

The actions are *not between the same parties;* nor are they based upon the same matter. We are dealing with *different causes of action, different parties plaintiff*, and the cases cited by counsel, while correctly stating the law where applicable, do not apply to the present situation.

If we sum up all of the claims of the railway company in this case, the best that can be said is that there is an admission that the Federal Act is supreme; that the Iowa judgment is not a bar in *entirety*, and does not *wholly* bar the cause of action, but that it does bar the one question of interstate commerce because that fact was found by the State Commissioner.

That finding under all the cases dealing with *res judicata*, cannot bind anyone who is *not a party* to the original suit unless they were in privity with such party.

There being no such privity, they cannot be bound.

We very respectfully submit to the court that there was no identity of parties under the decisions in the following cases:

Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. Ed. 586.

Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208.

Dennison v. Payne, 293 Fed. 333.

The Dennison case last referred to is squarely in point as to facts.

The petitioner in the case at bar states that the Troxell case is not in point because the first holding was that the

widow could *not* recover. Because the first adjudication was to the effect that she could *not* recover, it is claimed the case is different from the case at bar, where *a recovery was awarded* to Mrs. Hope by the Iowa Commission.

In the case of *Dennison v. Payne*, the Compensation Board did award compensation to the widow and the fact that this award was made was held not to be a bar to the case under the Federal Act because there was no identity of parties.

The Williams Case.

Counsel has laid great stress on the case of *Williams v. Southern P. R. Co.*, 202 Pac. 356, and have stated in their brief that this case determines the matter here at issue.

Let us see what the Williams case is. Ruth Williams, as administratrix, brought an action to recover damages under the Federal Act. For fear she might not recover under the Federal Act and wishing to get the limited compensation allowed by the State statute, *she, herself*, in her individual capacity, also made application to the Industrial Commission for compensation.

The Commissioner refused to stay its proceedings pending the determination of the action at law under the Federal statute. Before she got to try her case under the Federal Law, the Commission acted on her application and an award of $5,000 was made to her under the State Compensation Act.

The California court in that case reviewed a lot of decisions, most of them not in point and of no moment, and then *reached a conclusion at variance with the decision of the Supreme Court of the United States in the Troxell case.* For instance, in that part of the decision quoted at the bottom of page 47 of appellant's brief, it is said:

> "Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, the tribunal where jurisdiction first attaches, retains it exclusively."

No compensation body in California, or any place else, has *concurrent* jurisdiction of an action to recover damages *under the Federal statute.*

The court then refers to the matter of *res judicata* and cites the Troxell case. We have read the Williams decision with great care, in an attempt to find in it the distinction between the Troxell case and the case at bar, but the Williams case does not show such distinction.

Counsel for the railway company quote from and refer to the Williams case, laying stress on the holding that the fact "so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

As to this general rule, where applicable, there is no quarrel, but the Troxell case and the Ingersoll case show that the Supreme Court of the United States has taken the position that the parties are *not the same*, nor in privity.

The Williams case refers to the Troxell case, but *does not distinguish anything therein decided.*

On page 44, the doctrine of a *whole* estoppel, or of an action not being *wholly* barred is enunciated, but, as we have heretofore said, if the Industrial Commission's judgment was valid on the question of interstate commerce, it is immaterial as to its effect on any other question because *that* is the *whole* case.

It is folly to say that the judgment does not *wholly* bar the cause of action, but simply determines the *main issue* upon which the recovery in the second action depends. Fur-

ther the court in the Williams case, uses this language, in reference to the decision of this court in the Troxell case:

> "The question whether an issue actually determined in the first was conclusive on the same issue in the second as against a recovery for the benefit of Mrs. Troxell was not before the court."

This hardly squares with the fact. The Circuit Court of Appeals held that the judgment in the first Troxell case brought by Lizzie M. Troxell, *was a bar* to her *right to maintain the second action.* It is true the court did not attempt to *split up all the elements of the cause of action*, but the following language of the California court is not justified and is not correct:

> "The decision goes no further than to hold that because there was not identity of parties plaintiff in the two actions, the second was not *wholly* barred by the judgment in the first."

There is nothing in the Troxell case to warrant this conclusion by the California court.

In reversing the Circuit Court of Appeals, because that court held that the judgment in the first suit barred the prosecution of the second suit certainly the Supreme Court of the United States *did have before it the question of whether or not the issues determined in the first case barred a recovery in the second case.*

It is also to be remembered that in the Williams case, Mrs. Williams herself *sought* compensation before the Board, while in the present case the *scheme* was engineered *by the railway company.*

Ruth Williams in that case was a party to that proceeding. A. D. Schendel, as Special Administrator in the case

at bar, was *not* a party to the proceeding in Iowa.

We do not believe that the Williams case, a decision of a state court, which unsuccessfully attempts to distinguish the Troxell case, and which is contrary to it, and which is contrary to the cases of *Ingersoll v. Coram* and *Dennison v. Payne*, *supra*, can be taken as authority for holding that the State Act is supreme, that *there is identity* of parties in the two proceedings and the Federal right barred.

The Supreme Court of the United States has said that there was not such identity.

Ingersoll v. Coram and the cases upon which it is based, together with the Troxell case, have never been reversed or criticised by this court.

The question of identity of parties is not, therefore, an original one, but it has already been determined by this court.

In *Spokane & I. E. R. Co. v. Whitley*, 233 U. S. 487, 59 L. Ed. 1061, certain general principles of law applicable to the facts in the case at bar are given.

We quote the syllabus of the decision:

> "The *mother's right* to sue in Idaho as an heir under Id. Rev. Codes, No. 4100, upon a claim for damages for the negligent killing of her son, which was created for the benefit of his heirs by that statute, *is not barred by a judgment* of a Washington court *in an action upon such statutory liability*, brought by the administratrix appointed under the laws of Tennessee, to which action *the mother was not a party*, and in which, because brought without her sanction, she could not, under the Idaho statute, have been represented by the administratrix; nor is any different conclusion demanded because of a subsequent unsuccessful attempt by the

mother in the Tennessee courts to obtain a share in the proceeds of the recovery in the Washington suit."

The opinion was written by Mr. Justice Hughes, the concluding paragraph of which is as follows:

"It is apparent that the railroad company co-operated with the administratrix in securing the judgment in her favor, without bringing the mother in as a party, and without demanding that proof of authorization of the suit by the mother should be furnished. Had the railroad company made such a demand, there is no reason to believe that it would not have been sustained. Relying upon what appears to be an erroneous construction of the Idaho statute, it preferred to facilitate the administratrix in obtaining the recovery in the absence of the mother, and without its being shown that the suit was brought in her interest and with her authority, and the predicament in which it now finds itself is due solely to its own conduct."

This statement might well be made with reference to the decision of the railway company in the case at bar.

While the railway company did not co-operate with Mrs. Hope in procuring the adjudication before the Iowa Compensation Board, it did initiate the proceedings and had the award made "without demanding proof" that the cause of action was not being maintained by an administrator under the Federal statute. In fact the railway company had been specifically advised of this.

Mr. Justice Hughes further said:

"If she (the mother) was *not represented by the administratrix*, the Washington court was *without jurisdiction as to her*, and *the Idaho court was not bound to*

treat the judgment as a bar to her recovery in the present suit."

The same thing is true in the case at bar. The Administrator, A. D. Schendel, was *not a party to the Iowa Compensation proceeding*, and *he certainly was not represented in that proceeding by Mrs. Clarence Y. Hope.*

Therefore, the Compensation Commission *was without jurisdiction as to him*, and the *Minnesota court* was *not bound to treat the finding of the Commission* in favor of Mrs. Hope *as a bar to a recovery* by A. D. Schendel, as Special Administrator, in the present suit.

CONCLUSION.

We submit that the question of whether or not Hope was engaged in interstate commerce, when his last work was the setting of the brakes on two interstate cars, can be decided only one way.

Under the adjudicated cases his work was interstate as a matter of law.

To start with, then, we have *an employee engaged in interstate commerce, pursuing a Federal right.*

After starting *his* action in a court of competent jurisdiction, as known at common law, the railway company initiated proceedings under a State Compensation Act in an attempt to defeat his Federal right.

We contend that the Compensation Commissioner *did not have jurisdiction* of the subject-matter and did not have jurisdiction of the Administrator; that after the assertion of the Federal right, he was wholly without authority to proceed in the matter.

We further contend that because the Federal law is su-

preme and paramount, the Compensation Act cannot be used to *hinder, delay or interfere with* the plaintiff in the prosecution of his Federal right.

The conclusion follows that if this cannot be done *directly*, it cannot be done *indirectly under the guise of res adjudicata or equitable estoppel.*

The question of lack of identity of parties has been determined in several cases by this court, and this question is not one now open to further consideration by the court.

The Troxell case has settled the point.

In this controversy, involving a conflict between a law of the United States and a Compensation proceeding, wherein the State Commissioner seeks to hinder, delay, interfere with, and prevent the exercise of a Federal right, we very respectfully submit to this court that the Commissioner so proceeding cannot interfere with a Federal right. He must yield to the law of the United States, which is exclusive, paramount and supreme.

To hold otherwise would be to set the Federal statute at naught, and would amount to a nullification of a law of Congress by the action of an Industrial Commissioner.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Respondent.